STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7752

Petition of Vermont Transco LLC and Vermont Electric Power Company, Inc. (together referred to as "VELCO"), for authority to condemn easement rights in property interests of Olga Julinska, Sergei Kniazev, Carver Federal Savings Bank and BNE Energy, Inc., located in Wells, Vermont, for the purpose of reconstructing and maintaining an existing telecommunications facility for the so-called Statewide Radio Project (SRP)	)

Order entered: 11/22/2011

ORDER GRANTING MOTION TO COMPEL DISCOVERY

On November 8, 2011, Vermont Electric Power Company, Inc., and Vermont Transco LLC (collectively, "VELCO" or the "Company") filed a motion for an order compelling discovery pursuant to V.R.C.P. 26(h), 37(a) and Public Service Board Rule 2.14(A) ("VELCO Motion"). Specifically, VELCO sought an order directing Ms. Julinska and Mr. Kniazev (the "Landowners") to produce the documents and information the Company requested in Interrogatory 41 and Requests to Produce 6-11 and 16. On November 14, 2011, the Landowners filed a response opposing VELCO's request to compel discovery. On November 17, 2011, I issued a summary ruling granting the VELCO Motion.[1] In this Order today, I set forth my reasons for that summary decision.

In Vermont, a motion to compel discovery is filed pursuant to V.R.C.P. 37, which provides in relevant part:

1. The summary ruling was issued for the convenience of the parties to facilitate timely and adequate discovery in this proceeding. Shortly after that summary ruling was issued, the Company delivered an electronic copy of VELCO's Reply to Landowners' Memorandum in Opposition to Compel (the "VELCO Reply"). A hard copy of this document was formally filed in this Docket the next day, November 18, 2011. Accordingly, I did not consider the VELCO Reply in issuing my summary ruling on November 17, 2011, nor did I rely upon that filing in writing this Order.

> A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery . . . . if a party fails to answer an interrogatory submitted under Rule 33, or if a person, in response to a request for production . . . . fails to produce, the discovering party may move for an order compelling production . . . . in accordance with the request.
> . . . .
> For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

Thus, for a motion to compel discovery to be considered properly filed, the motion must satisfy the following predicate elements: (1) reasonable notice to the non-movant that a motion to compel may be filed; and (2) failure of the non-moving party to answer an interrogatory or to respond to a request for production.

I will deal first with the question of whether VELCO afforded the Landowners "reasonable notice" of its intent to apply for an order compelling discovery. The discovery requests at issue were first served upon the Landowners on September 14, 2011. The Landowners were due to file their responses to these requests on September 24, 2011, but in fact did not serve their responses on the Company until October 11, 2011.[2] In the weeks thereafter, counsel for VELCO "conferred in good faith" with opposing counsel for the Landowners by electronic mail and telephone "on several occasions in late October 2011, and most recently on November 4, 2011" in an effort to resolve their differences.[3] VELCO's motion to compel discovery answers followed the next week, on November 8, 2011 – nearly two months after it first served the discovery requests at issue in this dispute.

Based on the following facts, I find that the Company provided reasonable notice of its intent to apply for an order compelling responsive discovery answers from the Landowners: (1) the disputed discovery questions were first propounded to Landowners over two months ago on September 14, 2011, and have been pending unresolved since then; (2) at no time during the last two months have the Landowners moved for a protective order to excuse them from responding

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2. Docket 7752, Order of 9/23/11 at 2 (establishing 10-business-day turnaround rule for serving discovery responses); VELCO Motion, exh. A.

3. VELCO Motion, exh. B. In turn, counsel for the Landowners acknowledges that he "has conferred repeatedly with counsel for VELCO" to resolve their differences regarding the discovery requests at issue. Landowners' Reply at 2.

in a timely and acceptable manner to VELCO's discovery requests or to otherwise set limits on their duty to answer; (3) counsel for the Landowners has known for several weeks and has repeatedly conferred with VELCO's counsel regarding the Company's insistence upon receiving adequate answers to all of its discovery requests; and (4) time was of the essence for VELCO to complete discovery or exhaust its procedural remedies in aid thereof, given that the Second Scheduling Order in this docket established November 18, 2011, as the deadline for the Company to file its direct testimony regarding the valuation of the property rights that are proposed for condemnation.

I turn next to the issue of whether the Landowners have failed to answer questions or produce documents within the meaning of V.R.C.P. 37(a)(3). Interrogatories must be answered "fully" in writing, and if there is an objection, then the reasons "shall be stated in lieu of an answer."[4] In turn, responses to requests for production of documents must be made in writing as well, stating the reasons for any objection. When an objection runs to only part of the request, then the answer must specify the part of the request that is contested.[5]

The following are the disputed discovery requests, along with the Landowners' initial responses:

Interrogatory 41

> 41. Did Sergei Kniazev contact by phone or in writing, including mail, any landowner in Vermont on whose property VELCO is using for Statewide Radio Project facilities. If the answer is yes,
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> a. identify the name of each landowner Mr. Kniazev contacted;
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> b. identify the date and method of the contact;
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> c. explain the purpose of the contact; and
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> d. summarize what Mr. Kniazev told each landowner about VELCO, the Statewide Radio Project, and VELCO's plans for Mr. Kniazev's Wells, Vermont, property.

4. V.R.C.P. 33(a).
5. V.R.C.P. 34(b).

A. Objection, relevance.

. . . .

Requests to Produce

. . . .

6. Please produce all written communication between Olga Julinska and Sergei Kniazev together or individually with Nils Behn.

A. Objection, relevance. Further objections, proprietary information.

7. Please produce all written communication between Olga Julinska and Sergei Kniazev together or individually with any agent of Alteris Renewable.

A. Objection, relevance. Further objections, proprietary information.

8. Please produce all written communication between Olga Julinska and Sergei Kniazev together or individually with VEPP, Inc. and any agent of VEPP, Inc.

A. Objection, relevance. Further objections, proprietary information.

9. Please produce all written communication between Olga Julinska and Sergei Kniazev together or individually with Mark Baker of C15, Inc. related to

a. VELCO;

b. VELCO's Statewide Radio Project; and

c. the Voices for Good, Freedom From Harm event on Northeast Mountain in August 2011.

A. Objection, relevance. Further objections, proprietary information.

10. Please produce all written communication between Olga Julinska and Sergei Kniazev together or individually with any public official concerning VELCO's Statewide Radio Project planned for 201 Butts Hill Road, Wells, Vermont.

A. Objection, relevance. Further objection, overbreadth. Further, objection, unduly burdensome.

11. Please produce all documents relating to leasing any portion of the property at 201 Butts Hill Road, Wells, Vermont, to third parties, including but not limited to

advertisement, correspondence (including email), leases, licenses, rental agreements, data or information sheets, rental rules, or notes.

A. Objection, relevance. Further objection, overbreadth. Further, objection, unduly burdensome.

16. Please produce all written communication between Olga Julinska and Sergei Kniazev together or individually with BNE Energy, Inc.

A. Objection, relevance. Further objections, proprietary information. Notwithstanding the objections and without waiving same, a copy of the correspondence with BNE relating to its breach of the agreement will be produced pursuant to agreement by VELCO to keep the disclosure confidential under terms substantially the same as those set forth in the confidentiality order involving the parties in Docket No. 667-9-10 filed on or about December 29, 2010.

In reviewing the Landowners' response to Interrogatory 41, I observe that counsel for the Landowners interposed a cursory objection consisting of a single word: "relevance." This answer conveys no "reasons" for the objection. At most, counsel for the Landowners has indicated that he questions the relevance of VELCO's inquiry. However, absent a more specific explanation, there is no basis for me to determine whether there is any merit to this "relevance" objection. Therefore, I find the Landowners' answer to Interrogatory 41 is incomplete.

Similarly, I find the Landowners' responses to Requests to Produce 6-11 and 16 to be incomplete as well, though the attendant objections were slightly more expansive — the word "relevance" was accompanied by the phrase "proprietary information."[6] Again, these minimal answers are incomplete, as they provide no basis for testing the logic or facts supporting the proffered objection.

In sum, I have determined that the Landowners' responses to the discovery requests at issue in the VELCO Motion are incomplete. Therefore, each of these responses constitutes a "failure to answer" within the meaning of V.R.C.P. 37(a)(3). Accordingly, VELCO has met the predicate elements for seeking relief in discovery pursuant to V.R.C.P. 37.

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6. The objections to Requests 10 and 11 featured two additional words: "unduly burdensome."

Having thus established that the VELCO Motion is properly before me for review, I now examine this motion pursuant to V.R.C.P. 26(b)(1), which provides the controlling substantive legal standard governing the scope and limits of permissible discovery in Vermont.

V.R.C.P. 26 states:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[7]

As counsel for the Landowners has pointed out, '[t]he issues in this case are straightforward."[8] VELCO must establish (1) the necessity of condemning the property rights that are the subject of this docket; and (2) the value of the compensation that is due for the property rights it proposes to condemn. Morever, to pass muster under Rule 26(b)(1), VELCO's discovery requests must "appear reasonably calculated to lead to the discovery of admissible evidence." This standard reflects the broad scope of the discovery authorized by Rule 26. Thus, in objecting to the discovery questions at issue in the VELCO Motion, the Landowners have assumed a heavy burden that "cannot be met by 'a reflexive invocation of the same baseless, often abused litany that the requested discovery is vague, ambiguous, overly broad, unduly burdensome or that it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.'"[9]

VELCO argues that the discovery requests at issue "pertain to the property that is the subject of this proceeding, the Landowners' uses and plans for that property, and statements Landowners have made about VELCO and its work on Northeast Mountain."[10] The Company specifically contends that its requests fall into one or more categories: (1) wind energy development; (2) economic/financial benefits derived from use of the subject property; (3)

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7. V.R.C.P. 26(b)(1).
8. Landowners' Reply at 2.
9. *McGrath v. Everest Nat'l Ins. Co.*, 625 F.Supp.2d 660, 670 (N.D. Ind. 2008)(internal citation omitted).
10. VELCO Motion at 1-2.

statements made about VELCO and the Statewide Radio Project; and (4) party admissions. From VELCO's point of view, all of these matters "are on their face relevant to the matter pending before the Board, including the professional appraisal that is being performed for the valuation portion of this proceeding."[11]

In responding to the VELCO Motion, the Landowners have provided various and more detailed support for their objections than they conveyed in responding to VELCO's discovery requests.[12] I will now evaluate these objections and the supporting arguments set forth in the Landowners' Reply.[13]

In regard to Interrogatory 41 and Request to Produce 10, the Landowners assert that the Company seeks "disclosure of all conversations Mr. Kniazev may have had with any other landowner affected by the Statewide Radio Project," and that this information is of "speculative relevance" that would be "inadmissible without an expert foundation."[14] The information VELCO is seeking in Interrogatory 41 and Request to Produce 10 strikes me as reasonably calculated to lead to the discovery of admissible evidence. The Company is attempting to examine the facts underlying Mr. Kniazev's opposition to the condemnation of certain property rights that he owns and that are at issue in this docket. Because Mr. Kniazev is a party to this case, his out-of-court statements may constitute admissible evidence.[15] In objecting to VELCO's pursuit of disclosure of Mr. Kniazev's statements in discovery, the Landowners overlook that the appropriate time for testing the relevance of such information is during the technical hearings, and not in discovery. Therefore, I find the Landowner's relevancy objection to be without merit.

The Landowners further oppose Interrogatory 41 and Request to Produce 10 on the grounds that "these requests intrude directly into constitutionally protected activities" because VELCO "seeks information about [Mr. Kniazev's] associational activities in support of his beliefs and disclosure of his direct contacts with public officials on issues of public

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11. VELCO Motion at 2.

12. I find this fact troubling, as it suggests that the Landowners could have communicated much earlier their more complete grounds for objecting to VELCO's discovery requests.

13. VELCO Motion, exh. A at 19 and 29-32.

14. Landowners' Reply at 3-4.

15. See Vermont Rule of Evidence 801(d)(2).

importance."[16] It is well-established in American constitutional jurisprudence that the freedom of "political association as well as political expression" and the "freedom to associate with others for the common advancement of political beliefs and ideas is . . . protected by the First and Fourteenth Amendments."[17] For this reason, a court's power to command the production of information may not be used to violate the right of association guaranteed under the First Amendment.[18] The right "to associate for expressive purposes is not, however, absolute."[19]

The Landowners have cited no precedent from Vermont that establishes a standard for applying the "First Amendment privilege" in a discovery dispute. That said, the two supporting cases cited by the Landowners set forth the following framework: the party invoking the privilege must first make a *prima facie* showing that compliance with the discovery request "will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights."[20] The Landowners' Reply is devoid of any such showing. Therefore, I find the Landowner's effort to invoke the "First Amendment privilege" to be without merit.

In regard to Request to Produce 6, the Landowners have asserted "relevance" and "proprietary information" as the bases for their objection. Absent a more fully developed argument, and absent any verified allegations of bad faith on VELCO's part in propounding this question, I decline to summarily abrogate the Company's broad right under Rule 26 to inquire into subjects that may lead to the discovery of admissible evidence.

In regard to Request to Produce 7, the Landowners contend that VELCO "is asking to rummage through irrelevant, unproductive business discussions" with Alteris, a foreign corporation that invests in wind and solar energy facilities.[21] According to the Landowners, the Company is seeking information that "addresses a use that is not in place, and that did not even

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16. Landowners' Reply at 4.

17. *Buckley v. Valeo*, 424 U.S. 1, 15 (1976); *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

18. *National Ass'n for Advancement of Colored People (NAACP) v. State of Alabama ex rel. Patterson,* 357 U.S. 449, 460-62 (1958).

19. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

20. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160-1161(2010); *see also Dunnet Bay Construction Co. v. Hanning*, 2011 WL 5417123 *3 (U.S.D. Ill. 2011).

21. Landowners' Reply at 7.

produce a plan to institute such a use."[22] These arguments notwithstanding, I find the Company's request appears reasonably calculated to lead to the discovery of admissible evidence. The property rights proposed for condemnation in this docket are located on a hilltop in Vermont, a state that, as a matter of policy has expressed considerable interest in encouraging the development of renewable energy generation facilities. Among other things, the condemnation valuation process involves an assessment of the highest and best uses of the property rights at issue. It is not difficult to perceive that a reasonable appraisal in this docket could include considering whether the proposed condemnation would compromise the Landowners' prospects for generating revenue by placing renewable energy production facilities on their property.

The Landowners further describe the Company's information request relating to their dealings with Alteris as a matter of "annoyance and harassment" that would render them "business untouchables" because every conversation "that somehow relates to the property would be fodder for compelled disclosure" at VELCO's instance.[23] The Landowners have made no factual showing that would tend to lend any credence to these assertions. Therefore, I find these arguments to be without merit.

In regard to Request to Produce 8, the Landowners argue that the Company is pursuing "irrelevant and inadmissible" evidence relating to a contract they have entered into with the Vermont Sustainable Priced Energy Development Program facilitator ("VEPP, Inc.").[24] In support of this position, the Landowners point to the fact that they have already provided VELCO with a copy of this contract, and therefore "the demand for additional irrelevant and inadmissible details relating to the contract's negotiation is simply another instance of VELCO's insistence that it is entitled to fish into the Owners' affairs for any possible item of relevancy."[25] As I noted earlier, the economic and financial potential of the Landowners' property as a site for renewable energy generation is fairly at issue in this case, and therefore a subject of legitimate

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22. *Id*.

23. Landowners' Reply at 9-8. The Landowners also maintain that Alteris should have an opportunity to object to any disclosure to VELCO of its dealings with the Landowners, but do not explain the nature of their standing to raise this objection on behalf of Alteris.

24. Landowners' Reply at 9.

25. Landowners' Reply at 9.

inquiry by VELCO. In objecting to answering the Company's questions regarding their written dealings with VEPP, Inc., the Landowners again have failed to recognize that the relevance of the information VELCO is seeking is not at issue in discovery — this is an objection that is more appropriately raised during the technical hearings. Therefore, I find the Landowner's relevancy objection to be without merit.

In regard to Request to Produce 9, the Landowners contend that VELCO's questions concerning their written communications with Mark Baker of C15, Inc. are beyond the scope of fair discovery because Mr. Baker is a personal friend and thus there is "no plausible connection between this personal friendship and business relationship" and the valuation of the property rights at issue in this proceeding.[26] Accordingly, the Landowners maintain that state law does not give VELCO "broad rights to investigate the Owners' friends and colleagues with respect to matters or [sic] no relevance of [sic] attenuated claims of relevance."[27] As previously noted, the question of relevance is not at issue in the discovery phase of litigation. While Mr. Baker may be a personal friend of the Landowners, it is not readily evident that this fact encompasses the nature of the relationship between the Landowners and C15 Inc., the company identified in VELCO's information request. Moreover, the Landowners' Reply indicates that the Landowners have a "business relationship" with Mr. Baker, who "helped the Owners organize a public event" on their property in August of 2011.[28] Again, VELCO is entitled to develop a full understanding of the uses the Landowners are able to make of their property. This includes inquiring after their business dealings, if any, with C15, Inc. and Mr. Baker.

In regard to Request to Produce 11, the Landowners' Reply states that "in discussions between counsel, the Owners have agreed to provide an itemization of all rental income and a copy of the ad placed in Craig's List to offer the property for rent."[29] Therefore, the Landowners object to VELCO's insistence upon discovering "the name and address of every weekend tenant

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26. Landowners' Reply at 10.

27. As an aside, I find this argument to be unintelligible as formulated. It is not clear to me whether the Landowners are claiming that VELCO's request is directed at matters that have no relevance whatsoever, or whether any relevance that may exist is attenuated at best.

28. Landowners' Reply at 10.

29. *Id.*

and to see all e-mail or other matters relating to these incidental rentals."[30] By offering an itemization of their past rental income in place of any written primary source documents that may exist, the Landowners are asking VELCO to rely on their representations and to forego the possibility of independently corroborating that information. Such evidentiary stipulations are desirable, but they must be voluntary and are the product of trust between the parties. Regrettably, the fact that VELCO has moved to compel the production of the documents at issue in Request to Produce 11 demonstrates that the conditions favorable to the Landowners' proposed stipulation on this point simply do not exist.[31]

While I agree with the Landowners that they have offered to provide helpful information in response to this information request, I am not able to conclude that this answer is responsive, or that VELCO's request seeks information — beyond that which the Landowners have volunteered — that is not reasonably calculated to lead to the discovery of admissible evidence. The documents VELCO has asked for, assuming they exist, are patently relevant to assessing the potential for the Landowner's property to generate a rental income.[32] The Landowners have not provided any facts tending to show that this request is unduly burdensome or unreasonable in scope. Therefore, I find the Landowners' objections as to relevance, overbreadth and burdensomeness are without merit.

Finally, in regard to Request to Produce 16, VELCO states that "the parties agree that VELCO would request an order from the Hearing Officer compelling Landowners to produce an unredacted copy" of a lease agreement between the Landowners and BNE Energy, Inc. ("BNE").[33] In turn, the Landowners represent that they "do not object to an order by the hearing

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30. Landowners' Reply at 6. It is not clear to me from reviewing Request to Produce 11 that the Landowners have fairly characterized VELCO's request for information. The Company's request does not specify that it seeks "the name and address of every weekend tenant."

31. This absence of trust is further reflected in VELCO's statement that the information it has requested "may also impact the credibility of the claims Ms. Julinska will make in her upcoming prefiled testimony on condemnation damages." VELCO Motion at 7.

32. The Landowners' answer to Request to Produce 11 does not deny the existence of the documents VELCO has requested. The Landowners' Reply makes no representations on this point either. Therefore, for purposes of resolving this dispute, I have assumed that there exist documents in the custody or control of the Landowners that are responsive to the Company's request.

33. VELCO Motion at 7.

officer compelling production of the financial terms of the BNE contract to VELCO, assuming BNE does not petition the Board to keep the information confidential."[34] Accordingly, as I have received no filing from BNE, and absent any argument from the Landowners in support of their initial "relevance" objection, I conclude there is no basis for the Landowners to withhold production of the documents VELCO has requested in Request to Produce 16.

Having considered the arguments made by both parties, I am persuaded that the Company has made a *prima facie* showing that all of the disputed requests are "reasonably calculated to lead to the discovery of admissible evidence" in this proceeding. Accordingly, I grant the VELCO Motion, and the Landowners must disclose all of the requested information sought by the Company in response to the questions that are the subject of the VELCO Motion.

Furthermore, I observe that this discovery dispute was not resolved until November 17, 2011, which was the day before VELCO was due to file its direct testimony regarding valuation pursuant to the Second Procedural Schedule issued on October 18, 2011.[35] Accordingly, VELCO was obliged to prepare its prefiled testimony concerning valuation without the benefit of the discovery responses that I have compelled the Landowners to provide in this Order. Therefore, VELCO shall have the opportunity, if it so chooses, to prefile supplemental direct testimony on the issue of valuation on December 2, 2011.

SO ORDERED.

34. Landowners Reply at 5.

35. On November 18, 2011, VELCO requested an assented-to extension of this filing deadline until November 21, 2011. Absent objection from the other parties, VELCO's extension request was granted.

Dated at Montpelier, Vermont, this 22nd day of November, 2011.

s/June E. Tierney
June E. Tierney, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: November 22, 2011

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)